No. 12624

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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George T. Goggin, as Trustee of the Estate of Eugene C. Brisbane, Individually, and Brisbane & Company, a Limited Partnership, Bankrupts,

*Appellant,*

*vs.*

Consolidated Liquidating Corporation and United States of America,

*Appellees.*

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## APPELLANT'S OPENING BRIEF.

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TOPICAL INDEX.

PAGE

I.

Jurisdictional statement .......... 2

II.

Statement of the case .......... 3

III.

Specification of errors .......... 8

IV.

Summary of argument .......... 8

V.

Argument .......... 9

A. The referee in bankruptcy had the power to inquire into his own jurisdiction .......... 9

B. The withhold orders of the United States Maritime Commission and the General Accounting Office do not constitute a valid basis for the nonpayment by Consolidated of the moneys belonging to Brisbane & Company, a limited partnership, bankrupt .......... 11

C. The United States of America submitted to the jurisdiction of the Bankruptcy Court by filing its petition to intervene and participating in the hearing .......... 17

D. The referee had the summary jurisdiction to issue the order herein .......... 18

Conclusion .......... 23

# TABLE OF AUTHORITIES CITED

## Cases

| Cases | PAGE |
|---|---|
| A. & M. Brand Realty Corp. v. Woods, 19 L. W. 2194 | 15 |
| Bank of California National Assn. v. McBride (C. C. A. 9th, 1943) | 11 |
| Capitaine, In re, 31 Fed. Supp. 312 | 18 |
| Engineers Oil Properties Corporation, In re, 72 Fed. Supp. 989 | 20 |
| Gardner v. New Jersey, 329 U. S. 565 | 17 |
| Goldman, Matter of, 5 Fed. Supp. 973 | 19 |
| Lahey v. Trachman, 130 F. 2d 748, 50 Am. B. R. (N. S.) 212 | 20 |
| May v. Henderson, 268 U. S. 111 | 11 |
| Michaelis v. Lindeman, 196 Fed. 718 | 11 |
| Saybart Productions, In re, 175 F. 2d 15 | 22 |
| Shooters Island S. Co. v. Standard Shipbuilding Corp., 293 Fed. 706 | 17 |
| United States v. Kaufman, 267 U. S. 408 | 14 |

## Statutes

| Statutes | |
|---|---|
| Act of July 1, 1898, as amended (Chap. 541, Secs. 1 and 2, 30 Stats. 544, 545) | 2 |
| Anti-Kickback Act (Pub. Law 319, 79th Cong., 2d Sess.) | 4 |
| Bankruptcy Act, Sec. 5 | 13 |
| Bankruptcy Act, Sec. 5-h | 14 |
| Bankruptcy Act, Sec. 24 | 3 |
| Bankruptcy Act, Sec. 25 | 3 |
| United States Code, Title 11, Chap. 1, Sec. 1 | 2 |
| United States Code, Title 11, Chap. 2, Sec. 11 | 2 |
| United States Code Annotated, Title 41, Secs. 51, 52 | 12 |

## Textbooks

| Textbooks | |
|---|---|
| Collier on Bankruptcy (14th Ed.), Par. 5.03, pp. 691-692 | 14 |
| Collier on Bankruptcy (14th Ed.), Par. 23.08, p. 513 | 17 |

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## APPELLANT'S OPENING BRIEF.

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*To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:*

This appeal is from a final order of the District Court for the Southern District of California, Central Division, the Honorable Peirson M. Hall, Judge Presiding. [Tr. 67-69.] The order was made in a bankruptcy proceeding and was a reversal of the order of the Referee in Bankruptcy and a favorable determination of the appellees' petitions for review thereof. The said order constituted a ruling that the bankruptcy court had no summary jurisdiction over the subject matter of the dispute before it.

# I.
# JURISDICTIONAL STATEMENT.

As a court of bankruptcy, the United States District Court had jurisdiction of this cause pursuant to the Act of July 1, 1898, as Amended. (Chapter 541, Sections 1 and 2, 30 Stat. 544, 545, as Amended; United States Code, Title XI, Chapter 1, Section 1, and Chapter 2, Section 11.) On July 8, 1946, Eugene C. Brisbane doing business as Brisbane & Company, filed a petition under Chapter XI of the Bankruptcy Act and thereby commenced this bankruptcy proceeding. [Tr. 2-10.] On the same day the Honorable Leon R. Yankwich approved the petition and made an order of reference to Hugh L. Dickson, Referee of the bankruptcy court [Tr. 9]; subsequently, Eugene C. Brisbane, doing business as Brisbane & Company was adjudicated a bankrupt [Tr. 10] and on January 24, 1947, Referee Hugh L. Dickson, rendered an order adjudicating Brisbane & Company, a limited partnership, a bankrupt as a part of the same bankruptcy proceedings. [Tr. 11.]

On March 31, 1948, appellant-trustee filed a PETITION FOR ORDER TO SHOW CAUSE RE CONSOLIDATED STEEL CORPORATION praying that an order issue directing Consolidated Steel Corporation (later Consolidated Liquidating Corporation [Tr. 31] and hereinafter referred to as "Consolidated") to appear and show cause why it should not be required to turn over to the said trustee all moneys admittedly owing from said corporation to the within bankrupt estate. [Tr. 15-17.] An order to show cause was issued thereon by Referee Dickson on the same day [Tr. 17-18] and on April 22, 1948, the United States filed a petition for leave to intervene in the said proceedings. [Tr. 19-21.] By order dated April 12, 1949, the Referee in

Bankruptcy found in favor of the contentions of the trustee [Tr. 33-36] and a petition for review was filed by Consolidated [Tr. 39-41] and by the United States of America. [Tr. 43-47.] By order dated May 25, 1950, the Honorable Peirson M. Hall reversed the order of the Referee below. [Tr. 67-69.] Within the time allowed by law, appellant filed a notice of appeal [Tr. 70] and said appeal has been perfected by taking all the steps required by law.

The jurisdiction of the Court of Appeals is invoked pursuant to Sections 24 and 25 of the Bankruptcy Act. Appellate jurisdiction over this proceeding in bankruptcy vested in the Court of Appeals upon the trustee's filing his notice of appeal on June 13, 1950; the amount involved is in excess of $500.00.

## II.
## STATEMENT OF THE CASE.

Appellant is trustee in bankruptcy of two bankrupt entities being administered in the one bankruptcy case: Eugene C. Brisbane, individually, and Brisbane & Company, a limited partnership. On December 22, 1947, the bankruptcy court made an order segregating the claims and the assets of the two entities so that certain assets were ordered attributable to Brisbane & Company, a limited partnership, and certain other assets attributable to Eugene C. Brisbane, individually; in turn, the claims against each entity were ordered to be segregated and paid first from the entity against which the said claims were properly allowable. [Tr. 12-15.]

The trustee in bankruptcy learned that Consolidated was indebted to the bankrupt partnership on an open book account in the sum of $20,390.80 and that the said appellee, Consolidated, was further indebted to the bank-

rupt partnership upon certain purchase orders. [Tr. 31-32.] The trustee demanded the payment of these sums and when the payment was refused, filed a PETITION FOR ORDER TO SHOW CAUSE RE CONSOLIDATED STEEL CORPORATION praying that the Consolidated show cause why it should not pay said amount and alleging that Consolidated claimed no right, title or interest in or to said moneys. [Tr. 15-17.] An order to show cause was duly issued thereon by the Referee in Bankruptcy on March 31, 1948 [Tr. 18] and the United States of America filed a petition for leave to intervene. [Tr. 19-21.] The United States of America filed objections to the order to show cause [Tr. 21-23] and Consolidated filed a memorandum of points and authorities. [Tr. 23-31.]

In its objections, the United States contended that it had directed Consolidated to withhold payment to the bankrupt partnership allegedly in accordance with the provisions of Public Law 319 (79th Congress, 2nd Session), also known as the Anti-Kickback Act; the United States further argued it had asserted a substantial and bona fide claim of ownership to the property herein involved and that said claim was adverse to the claim asserted by the trustee in bankruptcy; the United States further stated that it had not consented to the determination of title to said property by summary proceedings in the bankruptcy court. [Tr. 21-23.] Consolidated, in its memorandum of points and authorities, also discussed the Anti-Kickback Act and made certain other contentions regarding the alleged unliquidated nature of the claim, the alleged adverse interests of the United States, and, finally, that a fraud was committed by Eugene C. Brisbane in his dealings with Consolidated's agent. For the foregoing reasons, Consolidated contended that there was a lack of summary jurisdiction in the bankruptcy court.

[Tr. 23-30.] Consolidated made no claim to the money owing on open account.

A hearing was held on this matter on April 22, 1948, at which the appellant-trustee and intervener, United States of America, and appellee, Consolidated, were represented by counsel. [Tr. 72-102.] The Referee authorized the intervention by the United States [Tr. 73] and the trustee called as a witness Mr. Robert M. Crawford, an employee of Consolidated. [Tr. 74.] Mr. Crawford designated himself as manager of the Accounting Department of the Shipbuilding Division of appellee Consolidated. Mr. Crawford testified that so far as the books and records were concerned, Brisbane & Company had completed contracts for Consolidated and that on an open book account Consolidated owed Brisbane & Company the sum of $20,390.82. [Tr. 74-75.]

Mr. Crawford also testified that there were certain contract termination claims on Maritime Commission contracts, purchase orders Nos. H-402 and H-135, on which certain amounts were owing after both Consolidated and the United States Maritime Commission representatives had audited the said claims [Tr. 74-75]; the amounts for these two termination claims were later stipulated to be $1370.72 and $4722.75 respectively, subject, however, to possible further processing by the United States Maritime Commission. [Tr. 31-32.] Mr. Crawford stated that the trustee had demanded the amounts set forth above but that on June 12, 1946, and on May 19, 1947, Consolidated had received certain communications from the United States Maritime Commission and from the General Accounting Office, Audit Division, respectively [Tr. 77-78]; these letters were introduced as Trustee's Exhibits 1 and 2. Trustee's Exhibit No. 1, a letter from the United States Maritime Commission, stated that Eugene

Charles Brisbane, "owner of Brisbane & Company" had paid more than $50,000.00 to one of Consolidated's employees in violation of the Anti-Kickback Act and that Consolidated should, therefore, withhold, in behalf of the government, the entire amount of the claim in question. [Tr. 61-62.] Trustee's Exhibit No. 2, the letter from the General Accounting Office, referred to the conviction of Mr. McBurney, the former purchasing agent for Consolidated, of conspiracy with Mr. Brisbane and others to defraud the United States through collusive bidding on purchase orders, and those purchase orders were set forth by number in the letter. The letter ordered Consolidated to withhold any payment of moneys to Brisbane & Company. [Tr. 62-64.]

Mr. Crawford testified that these letters constituted the only reason for the failure of Consolidated to pay the money owing to the bankrupt partnership; so far as Mr. Crawford knew, and he was in charge of the Accounting Department of the Shipbuilding Division of Consolidated, the money was owing and the amounts were correct. [Tr. 80-81.] The counsel for the United States of America asked the witness whether he had any knowledge of any fraud that might have been perpetrated by Mr. Brisbane in the performance of his contracts, but the witness replied that he had no such record. [Tr. 87.]

The Referee made findings of fact, conclusions of law, and an order thereon [Tr. 33-36], finding that Consolidated owed the bankrupt partnership the sum of $20,-390.82 on an open book account, and the sum of $1370.72 on Purchase Order No. H-402, and the sum of $4722.75 on Purchase Order No. H-135. [Tr. 34.] The Referee further found that the refusal of Consolidated to pay the above sums was based upon the letters from the Maritime

Commission and the General Accounting Office, and that neither the United States of America nor Consolidated had any substantial, bona fide, adverse claim to the said moneys and that these amounts were being held by Consolidated on behalf of the appellant as trustee of the bankrupt partnership herein. [Tr. 35.]

Both Consolidated [Tr. 39-42] and the United States of America [Tr. 43-47] filed petitions for review of the Referee's order and the reviewing judge, the Honorable Peirson M. Hall, reversed the said order. [Tr. 67-69.]

The District Judge concluded that the bankruptcy court could not have constructive possession of an unliquidated claim, and held that a claim is unliquidated if the one having actual possession contests it. [Tr. 67.] The District Judge also stated in his order that the claim of Consolidated was adverse in that "it did not owe the bankrupt the claimed money, if the United States were entitled to it." [Tr. 68.] The Judge found that the United States had a bona fide and not a spurious, colorable or frivolous claim in that its claim to the moneys was based upon certain statutes of the United States. [Tr. 69.] The Court ruled that the United States had saved its objection to summary jurisdiction of the Referee by its timely objection thereto. The Judge was unable to find that Consolidated had ever objected to the summary jurisdiction of the bankruptcy court, since it had not done so, but found that the United States was the true adverse claimant to the ultimate right to the said moneys. [Tr. 69.]

## III.

## SPECIFICATION OF ERRORS.

The order reversing the order of the Referee is erroneous in that the bankruptcy court had summary jurisdiction over the subject matter of the within proceedings.

## IV.

## SUMMARY OF ARGUMENT.

A. THE REFEREE IN BANKRUPTCY HAD THE POWER TO INQUIRE INTO HIS OWN JURISDICTION.

B. THE WITHHOLD ORDERS OF THE UNITED STATES MARITIME COMMISSION AND THE GENERAL ACCOUNTING OFFICE DO NOT CONSTITUTE A VALID BASIS FOR THE NON-PAYMENT BY CONSOLIDATED OF THE MONEYS BELONGING TO BRISBANE & COMPANY, A LIMITED PARTNERSHIP, BANKRUPT.

C. THE UNITED STATES OF AMERICA SUBMITTED TO THE JURISDICTION OF THE BANKRUPTCY COURT BY FILING ITS PETITION TO INTERVENE AND PARTICIPATING IN THE HEARING.

D. THE REFEREE HAD THE SUMMARY JURISDICTION TO ISSUE THE ORDER HEREIN.

## V.

## ARGUMENT.

### A. The Referee in Bankruptcy Had the Power to Inquire Into His Own Jurisdiction.

It is essential to note at the outset that the claim by appellant on the open book account in the amount of $20,390.82 is for work performed by the bankrupt partnership on behalf of Consolidated, appellee herein, and that no processing of this claim is needed or has ever been needed as far as the United States Maritime Commission is concerned. This sum is a debt that stands on the books of Consolidated and which would have been paid, were it not for the withhold order of the government agencies hereinabove described. As for the termination claims on the Purchase Orders Nos. H-402 and H-135, the United States of America has processed these termination claims as fully as it ever will; as evidenced by the withhold letters of the government agencies, no further action has been or will be taken on these claims.

It is further notable that in trustee's Exhibit No. 2 [Tr. 62-64] the General Accounting Office alleges that Eugene C. Brisbane paid certain moneys to one McBurney, an employee of Consolidated, allegedly as kickbacks. Nowhere in the letter is there any showing of any amount that the bankrupt partnership, Brisbane & Company, ever paid to McBurney as an alleged kickback in return for receiving a contract with the United States government or with Consolidated. The mere statement in these letters has resulted in the complete stalemate whereby, without proof, the creditors of the bankrupt partnership are deprived of large sums of money owing to the bankrupt

partnership for work performed, presumably based upon materials and services furnished by the said creditors of the partnership.

At no time has Consolidated ever contended that Brisbane & Company, a limited partnership, did not perform the work and furnish the material on which the within claims are based. Indeed, after all of the auditing was completed, the books still show the $20,390.82 owing on the open book account and the other sums hereinabove set forth as owing under the termination claims. It must be presumed, therefore, that the work was performed, the services and materials furnished, and that the ground, if any, for the refusal to pay the bankrupt partnership is based upon the alleged fraud of Eugene C. Brisbane, an individual.

It is not the contention of the appellant that the bankrupt or the bankruptcy court had actual possession of the moneys here involved at the time of the filing of the petition in bankruptcy. These moneys were clearly owing to the bankrupt partnership and were in the hands of Consolidated at that time and in the constructive possession of the bankruptcy court. Consolidated has never made any adverse claim to these moneys. The sole reasons for the failure to pay the same to the trustee herein are the letters from government agencies directing Consolidated not to pay. So far as it appears from the record and from the proof introduced before the Referee in Bankruptcy, there is no question but that Consolidated

would have paid the amount owing and in its hands were it not for the intervention of the government agencies here involved.

The United States and Consolidated contend, however, that the United States has a bona fide, adverse claim to those moneys. The mere fact that such a claim is made does not oust the bankruptcy court of its jurisdiction. It is well settled that the bankruptcy court has the power to examine into such claims in order to determine whether they are merely colorable or rest upon an untenable proposition of law.

> *May v. Henderson* (1924), 268 U. S. 111;
>
> *Bank of California National Assn. v. McBride* (C. C. A. 9, 1943);
>
> *In re Michaelis v. Lindeman* (D. C., S. D. N. Y., 1912), 196 Fed. 718.

**B. The Withhold Orders of the United States Maritime Commission and the General Accounting Office Do Not Constitute a Valid Basis for the Non-Payment by Consolidated of the Moneys Belonging to Brisbane & Company, a Limited Partnership, Bankrupt.**

It was therefore within the power of the bankruptcy court to inquire into its summary jurisdiction and to determine whether there was any basis for the withholding of these moneys owing by Consolidated. The ground stated by Consolidated for its withholding of the said moneys was the orders of the United States agents which

orders were based upon the Anti-Kickback Act.[1] It is obvious from that statute (quoted in full in footnote 1 to this brief) that its intent is to reduce the amount to be paid to a subcontractor or a prime contractor in an amount equal to the reward paid by said subcontractor or prime contractor for the particular contract involved. In the instant case we have no such problem. Although it is difficult to determine the basis upon which the United States and its agents acted since there was no evidence thereof, it is clear from the letter of the General Accounting Office dated May 19, 1947 [Tr. 62] that Brisbane, an individual, allegedly paid certain amounts to an agent of Consolidated; there is absolutely no proof that the

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[1]Statutes Involved.

The Anti-Kickback Act
(41 U. S. C. A., Secs. 51, 52.)

"§51. *Fees or Kick-backs by subcontractors on cost-plus-a-fixed-fee or cost reimbursable contracts: recovery by United States: conclusive presumptions: withholding of payments.*

The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, as defined in section 52 of this title, (1) to any officer, partner, employee, or agent of a prime contractor holding a contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever, on a cost-plus-a-fixed-fee or other cost reimbursable basis; or to any such prime contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contract, or to any such subcontractor either as an inducement for the award of a subcontractor or order from the prime contractor or any subcontractor, or as an acknowledgment of a subcontract or order previously awarded, is hereby prohibited. The amount of any such fee, commission, or compensation or the cost or expense of any such gratuity or gift, whether heretofore or hereafter paid or incurred by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor or higher tier subcontractor. The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor

bankrupt limited partnership participated in any fraud or that the said partnership has received any benefits from Brisbane's alleged illegal acts. As is shown by the record, there has been a clear division of entities involved in the within bankruptcy proceedings so that the assets and liabilities of the individual and of the partnership have been kept clearly distinct. [Tr. 12.] This is in accordance with the well established rule in bankruptcy which recognizes that a partnership is a distinct entity under the Bankruptcy Act. (Bankruptcy Act, §5.)

> "As such legal entity, a partnership owns its property and owes its debts, apart from the individual

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or the recipient thereof by set-off of moneys otherwise owing to the subcontractor either directly by the United States, or by a prime contractor under any cost-plus-a-fixed-fee or cost reimbursable contract, or by an action in an appropriate court of the United States. Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee, or agent of a prime contractor or of another higher tier subcontractor, in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the cost of such expense was included in the price of the subcontract or order and ultimately borne by the United States. Upon the direction of the contracting department or agency or of the General Accounting Office, the prime contractor shall withhold from sums otherwise due a subcontractor any amount reported to have been found to have been paid by a subcontractor as a fee, commission, or compensation or as a gift or gratuity to an officer, partner, employee, or agent of the prime contractor or another higher tier subcontractor, Mar. 8, 1946, c. 80, §1, 60 Stat. 37.

"§52. *Same: definitions.*

For the purpose of sections 51-54 of this title, the term 'subcontractor' is defined as any person, including a corporation, partnership, or business association of any kind, who holds an agreement or purchase order to perform all or any part of the work or to make or to furnish any article or service required for the peformance of a cost-plus-a-fixed-fee or cost reimbursable contract or of a subcontract entered into thereunder, and the term 'person' shall include any subcontractor, corporation, association, trust, joint-stock company, partnership, or individual. Mar. 8, 1946, c. 80, §2, 60 Stat. 38."

property of the members which it does not own and apart from the individual debts of its members which it does not owe. The individuals and the firm are entities separate and distinct from one another."

*Collier on Bankruptcy,* 14th Ed., Par. 5.03, pages 691-692.

In accordance with this doctrine, income taxes owing by an individual partner can not be paid from the assets of the partnership in bankruptcy until the debts of the partnership creditors shall have first been paid, and there is a surplus over to be distributed to the individual partners.

*United States v. Kaufman* (1925), 267 U. S. 408.

The bankruptcy court is given the overriding power to marshal the assets and liabilities of the individual partners and of the partnership, so as to prevent preferences and to secure the equitable distribution of the several estates.

*Bankruptcy Act,* §5-h.

Whatever right the Maritime Commission or the General Accounting Office might have had to prevent the distribution of moneys to Eugene C. Brisbane individually, there is no basis stated in their letters warranting a withholding of moneys owing to the bankrupt partnership, Brisbane & Company, to the detriment of the partnership creditors. Indeed, these creditors are the ones who furnished the materials and the services that enabled the limited partnership to fulfill their contracts with Consolidated.

The inherent unsoundness of the position of the appellees is derived from the Anti-Kickback Act itself. This

legislation apparently purports to authorize government agents to direct the withholding of moneys otherwise admittedly owing without any procedure for the litigation or determination of the justice and fairness of such withhold orders. Neither the bankrupt partnership nor its trustee has ever been permitted to question the determination of these government agents. No one has been permitted to examine the evidence, if any, upon which the withhold orders are based. No opportunity has been given to prove that the bankrupt partnership did not participate in or profit from the alleged kickbacks.

Consolidated and the United States of America therefore seek to withhold moneys from the trustee of the limited partnership for services performed and materials furnished by that organization without review by any court and without the presentation of any evidence. It is a basic principle of our law that such a result would be a deprival of property without due process of law and, therefore, of no force or effect.

> *A. & M. Brand Realty Corp. v. Woods* (U. S. D. C., D. C., 1950), 19 L. W. 2194.[1a]

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[1a] "It is well settled that if a statute is subject to two constructions, one of which would raise a doubt as to constitutionality and the other would render the statute clearly constitutional, the court would prefer the second of the two interpretations.

"The court, therefore, construes the statute to contemplate judicial review in an appropriate proceeding. If the statute, however, is not to be so construed, then in any event this court may examine the question whether an order of the Expediter results in a deprivation of property without due process of law, that is, whether it is confiscatory. Naturally, the scope of review is narrower than that provided by the Administrative Procedure Act. Probably the only question that may be examined is whether the rate fixed is confiscatory."

Accordingly, the trustee sought to have the bankruptcy court exercise its summary jurisdiction to determine whether these moneys (which were not claimed by Consolidated for itself and which Consolidated admitted were owing) were being withheld under a mere colorable adverse claim. Instead of presenting any evidence, the intervenor United States of America sought to inject itself into the proceedings and to deny the bankruptcy court its right to inquire into its own jurisdiction. Consolidated, in turn, offered no evidence but, instead, filed a memorandum of points and authorities [Tr. 23], apparently in support of the objections of the United States.

The bankruptcy court was therefore compelled to decide the question upon the evidence presented to it, consisting of the testimony of Mr. Crawford, which has been set forth in detail above, and the introduction of the two withhold letters from the governmental agencies. It is submitted that the Referee was correct in his conclusion that Consolidated owed the money and had advanced no substantial adverse claim.

## C. The United States of America Submitted to the Jurisdiction of the Bankruptcy Court by Filing Its Petition to Intervene and Participating in the Hearing.

The United States, on the other hand, was not made a party to this proceeding except by its own motion. The United States apparently has been contending that this is a suit against the United States without its consent, but it is clear that the contracts here involved were made between Consolidated and the bankrupt partnership; it therefore follows that the litigation should be between the contracting parties. The United States is in no way bound by any litigation between the trustee and Consolidated since the United States need not be a party thereto and would be permitted to make its own determination whether it would reimburse the prime contractor. It should be sufficient answer merely to state that a contractor, who has a cost reimbursable contract with the United States, is not entitled to breach its own contract with a third party and then avoid a suit brought by the third party on the ground that a recovery might result in added cost to the United States. Furthermore, it is basic that an intervenor can make no objection to lack of jurisdiction.[2]

It would seem equally clear that if a sovereign may subject itself to the jurisdiction of the bankruptcy court by filing a claim therein, it may submit itself to jurisdiction by a petition in intervention. (See *Gardner v. New Jersey* (1947), 329 U. S. 565.)

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[2]*Collier on Bankruptcy*, 14th Ed., Par. 23.08, p. 513. See also *Shooters Island S. Co. v. Standard Shipbuilding Corp.* (1923, C. C. A. 3), 293 Fed. 706, and cases there cited.

## D. The Referee Had the Summary Jurisdiction to Issue the Order Herein.

In view of the insubstantial and colorable nature of the claim of Consolidated to the moneys here involved, it is clear that the bankruptcy court had the summary jurisdiction to require Consolidated to turn the moneys over to the trustee. If this were a mere debt owing by Consolidated to the trustee and Consolidated showed that it had a substantial defense, there is no doubt but that summary jurisdiction in the bankruptcy court would be lacking. But such has never been the defense of Consolidated; rather the appellee has contended that it is unable to pay because of the withhold orders of the United States of America.

There are many cases holding that where a debtor acknowledges the existence of the debt but contends that it is unable to pay because of the act of a third party, the bankruptcy court has summary jurisdiction to determine whether the admitted debtor is withholding payment under a tenable proposition of law. Such was the holding in *In re Capitaine* (D. C., Ed. N. Y., 1940), 31 Fed. Supp. 312. In that case the bankrupt asserted a claim against American-News but American-News was unwilling to pay because of a claim made upon it by one Lyons. When the trustee instituted a summary proceeding Lyons objected to the jurisdiction of the bankruptcy court, alleging that the bankrupt had previously assigned the account to him and that, therefore, he had a bona fide adverse claim which removed the cause from the jurisdiction of the bankruptcy court. The court found that the bankrupt had retained certain rights to this account and that, therefore, summary jurisdiction existed to determine the trustee's right to collect the funds from American-News.

Similarly, *In Matter of Goldman* (D. C., N. Y., 1933), 5 Fed. Supp. 973, the trustee instituted a summary proceeding to require one Rhodes to deliver certain shares of stock to the trustee, alleging that the shares were the property of the bankrupt estate. Rhodes held the stock pursuant to an escrow agreement between the bankrupt and others and, pursuant to a settlement agreement, the stock was to go to the bankrupt. The individuals who had given the stock to Rhodes had sought to rescind this agreement and had brought suit for that purpose in the state court; Rhodes, therefore, refused to relinquish the property to the trustee. The court held that there was summary jurisdiction in the bankruptcy court to order the turn-over of these shares of stock, stating:

> "Property held for the bankrupt by another who makes no claim to it may be summarily collected by the bankruptcy court, despite the fact that third persons make claims adverse to the bankrupt. *Orinoco Iron Co. v. Metzel* (C. C. A., 6th Cir.), 36 Am. B. R. 247, 230 F. 40; *In re Hoey, Tilden & Co.*, 292 F. 269. See also *Buss v. Long Island Storage Warehouse Co.* (C. C. A., 2d Cir.), 23 Am. B. R. (N. S.) 66, 64 F. (2d) 338. This is on the theory that the bankruptcy court came into constructive possession of the property when the petition was filed, and as to property in its possession the court may determine the rights of claimants in summary proceedings. The shares of stock held by Rhodes for the bankrupt's benefit have therefore been in the constructive custody of the court and subject to its orders since the commencement of the bankruptcy proceeding. Rhodes should be directed to deliver the property to the trustee. By the same token the persons who subsequently commenced suit in another court to obtain the property should be restrained. *O'Dell v. Boyden*

(C. C. A. 6th Cir.), 17 Am. B. R. 751, 150 F. 731; *In re Hoey* (C. C. A. 2d Cir.), 1 Am. B. R. (N. S.) 107, 290 F. 116. The custody of the bankruptcy court is prior in point of time and draws to that court all controversies over the property."

In *Lahey v. Trachman* (C. C. A. 2, 1942), 130 F. 2d 748, 50 Am. B. R. (N. S.) 212, the court held that the bankruptcy court had summary jurisdiction to require the City of New York to turn over a sum to the trustee in bankruptcy, said sum representing a refund of an assessment. The City of New York made no claim to the moneys, merely desiring that they be transmitted to the correct person. Certain claimants alleged that they had rights in this fund and, therefore, contended that there was no summary jurisdiction in the bankruptcy court to order the turnover of the moneys. The court flatly stated, without discussion, that there was summary jurisdiction in the bankruptcy court since the City of New York laid no claim to an interest in these moneys.

A similar problem confronted a New York District Court in the recent case of *In re Engineers Oil Properties Corporation* (D. C., N. Y., 1947), 72 Fed. Supp. 989. There the debtor was the owner of several oil leases and was engaged in the business of drilling oil. The fee-owners of the land had a one-eighth interest in the oil and gas produced and there was, in addition, a one-eighth overriding royalty payable to various individual investors. A petition for reorganization was filed under Chapter X and the overriding royalty interests, mentioned above, were

cancelled. The oil had regularly been sold to the Texas Company which deducted the fee-owners' one-eighth royalty as well as the one-eighth overriding royalty and remitted the other three-quarters of the proceeds to the debtor; in view of the plan of reorganization, the Texas Company should have remitted the usual three-quarters of the proceeds plus the one-eighth overriding royalty, no longer to be paid. The Texas Company refused to do this and an order to show cause was brought against the Texas Company to show why it should not pay the debtor the money due. The Texas Company maintained that the bankruptcy court lacked the jurisdiction to order it to pay over the money. The ground upon which the Texas Company refused to pay over the overriding one-eighth royalty, was that the bankruptcy court had no jurisdiction to effect an overriding royalty since, under Texas law, such a royalty is an interest in land. The District Court held that there had been summary jurisdiction in the bankruptcy court to order the payment of the moneys. It reaffirmed the settled rule that "where property alleged to belong to bankrupt is in possession of a third party who is not claiming a beneficial interest in it either for himself or for another, the bankruptcy court has summary jurisdiction to order the third party to turn over the property. Remington on Bankruptcy, 4th Ed., Sec. 2388.65, p. 584; Collier on Bankruptcy, 14th Ed., Sec. 23.06, p. 478, N. 7."

Accordingly, Consolidated is similarly without any beneficial interest in the moneys owing to the bankrupt partnership herein. Consolidated, in fact, does not claim any

interest in these moneys for another. Consolidated simply takes the position that it cannot pay because of the letters sent to it by certain administrative agencies of the United States Government. The bankruptcy court had jurisdiction summarily to determine whether there was any basis for the withholding of these moneys by Consolidated.

See also:

*In re Saybart Productions* (C. C. A. 8, June 17, 1949), 175 F. 2d 15.

Finally, the District Judge has stated in his order [Tr. 68] that with respect to the amounts set forth on the two purchase orders, those claims are unliquidated because final approval of the Maritime Commission is required. These claims are liquidated as fully as they will ever be. It is quite apparent that all of the parties have agreed to the amounts of these claims [Tr. 31], and that the amounts stated in the stipulation are correct "unless the United States Maritime Commission should require further processing . . ." The United States Maritime Commission has never required further processing and, as evidenced by the withhold letters, refused to take any further action on these claims. The appellant is helpless in this situation and has done everything within his power to bring about a final auditing of the particular claims. If relief were to be denied, the trustee upon the ground that the claims have not finally been processed by the United States Maritime Commission, the net result would be that the Commission can refuse to process these claims and, therefore, defeat the collection thereof.

## Conclusion.

The limited partnership bankrupt herein has satisfactorily completed its contracts with Consolidated and the latter has conceded that its books reflect the amounts owing to Consolidated and that payment is withheld because of the withhold letters. The arbitrary and unilateral action by certain government agencies has caused severe detriment to the innocent creditors of the bankrupt partnership. The Referee had the power to inquire into the extent of its own jurisdiction and to determine, upon all of the evidence, that the refusal of Consolidated to pay was based not upon a true adverse claim but, rather, upon a claim that was merely colorable. For the reasons stated herein, the refusal to pay has been and is without any proper legal or equitable basis whatsoever.

Appellant respectfully prays that this Court reverse the order of the District Court below with directions that the findings of fact, conclusions of law and order of the Referee in Bankruptcy be affirmed.

Dated this 4th day of December, 1950.

Respectfully submitted,

Martin Gendel

*Of Counsel for Appellant, Trustee in Bankruptcy.*